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IN THE

# Supreme Court of the United States

October Term, 1979
No. 8, Original

STATE OF ARIZONA,

*Complainant,*

*vs.*

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

*Defendants,*

UNITED STATES OF AMERICA and STATE OF NEVADA,

*Intervenors,*

STATE OF NEW MEXICO and STATE OF UTAH,

*Impleaded Defendants.*

**Motion of the States of Arizona, California, and Nevada and the Other California Defendants for Leave to File Exceptions to the Memorandum and Report of Special Master Elbert P. Tuttle and for Stay Order; Exceptions; and Opening Brief of Said Parties in Support of Their Motion and Exceptions.**

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IN THE

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STATE OF ARIZONA, *Complainant,*

*vs.*

STATE OF CALIFORNIA, *et al.*

**Motion for Leave to File Exceptions to the Memorandum and Report of the Special Master and for a Stay Order.**

The States of Arizona, California, and Nevada and the Other California Defendants (hereinafter referred to as "State Parties") move the Court for leave to file Exceptions to the Memorandum and Report on Preliminary Issues of Special Master Elbert P. Tuttle.

The Exceptions are based on the grounds, to be developed in our opening brief, that the determinations of the Special Master are erroneous and contrary to the law.

We recognize that in the normal course any exceptions to rulings of the Special Master would be filed after he has acted on all issues relating to intervention and tribal claims to additional water. Nevertheless, after the most careful consideration, we have concluded that implementation of the Special Master's preliminary rulings would cause irreparable prejudice to the interests

of the State Parties and that we cannot afford to postpone review by this Court until after the Special Master holds a full trial on the merits of the tribal claims. By letter of November 7, 1979 from the Special Master, we are advised that the final hearing on the merits is set for May 26, 1980; hence a stay order is necessary pending the Court's ruling on this motion and Exceptions.

**Statement of Exceptions.**

The States of Arizona, California, and Nevada and the Other California Defendants except to the Memorandum and Report of the Special Master, dated August 28, 1979, upon the following grounds:

I

**Exceptions Relating to Permitting the Introduction of Evidence of Practicably Irrigable Acreage by the United States and the Five Indian Tribes* as to So-Called Omitted Lands (Memorandum and Report, at p. 41).**

**A. The Issue.**

Whether Article IX of the Court's 1964 Decree in this case and the doctrines of *res judicata* and collateral estoppel permit the relitigation of practicably irrigable acreage within the recognized 1964 boundaries?

**B. The Determination to Which Exception Is Taken.**

The Special Master erroneously concludes:

Evidence may be introduced by the United States and the Tribes as to any reservation lands which

*The Five Tribes seeking intervention are the Chemehuevi, Cocopah, Colorado River, Fort Mojave, and Quechan Tribe of the Fort Yuma Indian Reservation.

they contend were omitted from the determination of practicably irrigable lands within the 1964 boundaries; and that he need not rule on the State Parties' opposition to so proceeding.

### C. The Correct Conclusions.

The Special Master should have concluded:

1. The Court intended Article IX to reserve jurisdiction only over matters not finally determined and that it did, in Article II of the Decree, finally adjudicate irrigable acreage within the 1964 boundaries, as recommended by the previous Special Master. Such final adjudication is not subject to the Court's continuing jurisdiction under Article IX.

2. Relitigation of practicably irrigable acreage within the 1964 boundaries is precluded by the public policy considerations behind the doctrines of *res judicata* and collateral estoppel.

## II

## Exceptions Relating to the Final Determination of Reservation Boundaries Within the Meaning of Article II(D)(5) of the March 9, 1964 Decree (Memorandum and Report, at pp. 31-41).

### A. The Issue.

Whether the boundaries of the respective Indian reservations have been finally determined within the meaning of Article II(D)(5) of the March 9, 1964 Decree, permitting adjustment by this Court of the reservation water allocations?

### B. The Determinations to Which Exception Is Taken.

The Special Master erroneously concludes:

The boundaries of the Indian Tribes have been finally determined by Act of Congress, by final judgment

of a court of the United States or by "final" action of the Department of the Interior and said determinations may be accepted as final for the purpose of considering additional allocations of water rights to the reservations.

### C. The Correct Conclusions.

The Special Master should have concluded:

The orders of the Secretary of the Interior and the judgments in the federal court cases are not final determinations of reservation boundaries for purposes of establishing water rights. The Secretarial orders relied on by the Tribes are functional for Department of the Interior administrative purposes, but cannot be considered final for the purpose of establishing claims for federally reserved water rights. The federal court judgments do not have *res judicata* effect on the rights of the State Parties who were not parties to the actions nor in privity with any party.

## III

## Exceptions Relating to the Sovereign Immunity of the States Under the Eleventh Amendment (Memorandum and Report, at pp. 16-30).

### A. The Issue.

Whether the Eleventh Amendment bars intervention in this suit by the Indian Tribes without the consent of the States of Arizona, California, and Nevada?

### B. The Determinations to Which Exception Is Taken.

The Special Master erroneously concludes:

1. That the States' Eleventh Amendment immunity is not implicated by the Tribes' motions to intervene because their claims as intervenors are ancillary to

a case or controversy between a state and sister states and between the United States and states.

2. Assuming the Eleventh Amendment immunity is implicated, 28 USC 1362 abrogated that immunity as regards suits by Indian tribes.

### C. The Correct Conclusions.

The Special Master should have concluded:

1. States of the Union are immune from suit by Indian tribes in federal court without their consent except where that immunity has been surrendered through the adoption of the Constitution of the United States as implemented by Congressional enactment. 28 USC 1362 does not constitute such a surrender, as applied to this case, because it only allows suits by Indian tribes in instances where the United States could have sued on their behalf but failed to do so.

2. By seeking to establish additional claims adverse to the three States, the intervention sought by the five Indian Tribes would constitute a suit against each State. The fact that the tribal claims have already been asserted before the Special Master by the United States does not deprive the three States of their Eleventh Amendment right not to be sued by the Tribes also asserting those claims.

## IV

## Exceptions Relating to the Tribes' Motions to Intervene Despite Participation of the United States on Their Behalf (Memorandum and Report, at pp. 6-16).

### A. The Issue.

Whether the five Indian Tribes meet the requirements for intervention in a case before this Court? And whether such intervention supplants the appearance of the United States on behalf of the Tribes?

**B. The Determinations to Which Exception Is Taken.**

The Special Master erroneously concludes:

1. The Tribes should be permitted to unconditionally intervene to assert their own pecuniary interests since those interests will be determined by the litigation.

2. Representation of the Tribes' interests by the United States may be inadequate.

3. The Tribes' intervention does not preclude continued appearance by the United States. Representation of the Tribes' interests by both the Tribes themselves and the United States will not prejudice the State Parties by causing duplication, delay, and confusion.

**C. The Correct Conclusions.**

The Special Master should have concluded:

1. No conflict of interest exists on the part of the United States which would prevent adequate representation of the Tribes. The United States has always vigorously asserted the Indian position and there is no reason to doubt that the United States will forcefully assert additional Indian Tribe water rights claims under Articles II(D)(5) and IX of the 1964 Decree. Therefore, the Tribes have not satisfied the inadequacy of representation requirement for intervention of right under Federal Rule 24(a) and in addition have not shown a compelling interest such as to justify intervention.

2. The Tribes may not be simultaneously represented by their own private counsel and by the United States. Multiple legal representation of the Tribes' interest would cause undue delay and prejudice to the State Parties and preclude permissive intervention under Federal Rule 24(b).

WHEREFORE, the State Parties request that the Court rule on these Exceptions to the Memorandum and Report of Special Master Tuttle at this time, that the Court decide this cause in the manner indicated above, that the Court stay further proceedings before the Special Master pending disposition of this motion and the exceptions, and that the Court issue such further orders as it deems proper.

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## Opening Brief in Support of Motion and Exceptions

### ARGUMENT

### I

### SPECIAL MASTER TUTTLE'S AUGUST 28, 1979 ORDER PERMITTING RELITIGATION OF PRACTICABLY IRRIGABLE ACREAGE WITHIN THE RESERVATION BOUNDARIES AS RECOGNIZED IN THE 1964 DECREE VIOLATES THE POLICIES UNDERLYING THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL AND SEVERELY HARMS THE STATE PARTIES

#### A. Introduction

As part of the 1956-1958 proceedings before the previous Special Master appointed by the Court in this case, the issue of practicably irrigable acreage within the Indian reservations was tried and findings were made by the Master and adopted by the Court. Nevertheless, the United States twenty years later claims certain reservation lands having practicably irrigable

acreage were not included in its presentation to the Special Master and that it should now be permitted to make such a showing and be awarded additional water entitlements based thereon. (Motion of the United States for Modification of Decree, dated December 21, 1978, at pp. 23-30, hereinafter referred to as "U.S. Motion".) The State Parties have responded that such a course would contradict applicable doctrines of *res judicata* and collateral estoppel, would be inconsistent with the 1964 Decree of the Court allocating water for the reservations, and would open up for costly retrial the entire subject of practicably irrigable acreage of the five Indian reservations because no findings were made identifying the practicably irrigable acreage of each reservation. (Response of the States of Arizona, California and Nevada and the Other California Defendants to the Motion of the United States for Modification of Decree, dated February 14, 1979, at pp. 4-10.)

Nevertheless, Special Master Tuttle by his August 28, 1979 Memorandum and Report on Preliminary Issues (p. 41) (hereinafter referred to as "Memorandum and Report") has ruled that he will hear evidence of practicably irrigable acreage on so-called "omitted lands" and will reserve ruling on the arguments in opposition to such relitigation asserted by the State Parties. In so proceeding, the Special Master is subjecting the State Parties, as well as the United States and the five Tribes, to great expense of trial preparation and presentation which, we submit, will be utterly wasteful in view of the legal arguments urged in bar of relitigating issues that have been tried previously. In effect, the Special Master is not reserving an evidentiary ruling, which is not uncommon, but rather a ruling on whether a cause of action is stated, and requiring

the parties to proceed to trial after which he will determine whether a cause of action was pleaded. Such a course defies reason as well as well-established judicial procedure.

**B. Claims of the Tribes to Water in the Mainstream of the Colorado River Were Asserted by the United States, Fully Tried by Special Master Rifkind and Finally Determined by this Court**

The United States, on behalf of the five Indian Tribes, asserted rights to water in the mainstream of the Colorado River before Special Master Rifkind. The United States relying on *Winters v. United States*, 207 U.S. 564 (1908), claimed it had the power to create a water right appurtenant to the lands of an Indian reservation without complying with state law. Special Master Rifkind concluded that the United States, when it created the Indian reservations along the lower Colorado River, intended to reserve for them the waters without which their lands would have been useless. The Special Master found that the magnitude of this reserved water right was measured by the amount of practicably irrigable acreage within the reservations and not by the number of Indians inhabiting them. Thus, Special Master Rifkind accepted the claim of the United States and awarded water rights in quantities sufficient to irrigate *all* the practicably irrigable acreage in each of the reservations. (Report of Special Master, December 1960, pp. 254-287.)

The Court accepted the Master's conclusion as to the quantity of water intended to be reserved. [See, Opinion of the Court, 373 U.S. 546 at 600 (1963).] The Court concluded, as did Special Master Rifkind,

that the only feasible and fair method by which reserved water for the reservations could be measured was practicably irrigable acreage. The various amounts of practicably irrigable land which the Master found to be on the different reservations was found to be reasonable by the Court. (Opinion of the Court, *supra* at 601.)

Thus, the issue of the amount of practicably irrigable acreage within the boundaries recognized in the 1964 Decree of all five Indian reservations was fully tried by Special Master Rifkind. Substantial evidence, including expert testimony, maps, and soil surveys, was presented by the parties during the lengthy proceedings on this issue. At the time the original decision was made by the Department of Justice lawyers and their experts as to the practicably irrigable acreage, there were ample data on soils, the location of then-existing irrigation facilities, and the economic feasibility of extending those facilities. (See, Transcript of the Proceedings before Special Master Rifkind, pp. 12,984 *et seq.;* and 14,119 *et seq.*) The United States' present contention that reservation lands were "omitted" from practicably irrigable acreage consideration is an attempt to relitigate the issue of practicably irrigable acreage some 20 years after the trial before Special Master Rifkind on that issue and is therefore untenable.

Indeed, the lands in question were not overlooked by the United States in the earlier proceedings. All the lands within the conceded boundaries were fully considered and taken into account by the United States' attorneys and their experts, and those determined not to be practicably irrigable were consciously excluded from any water allocation claim, and the parties, Special Master, and the Court were all so advised in the

course of the trial proceedings.[1] Thus, the lands in question are more properly referred to as "lands deemed nonirrigable."

### C. Public Policy Considerations Behind the Doctrines of Res Judicata and Collateral Estoppel Should Preclude Relitigation of Practicably Irrigable Acreage

The doctrine of *res judicta* is a judicially created doctrine, which exists as a rule of reason, justice, fairness, expediency, practical necessity, and public tranquility. The doctrine is based on the worthy premise that the interest of the proper administration of justice is best served by limiting parties to one fair trial of an issue. It is a fundamental principle of jurisprudence that material facts or questions which were directly in issue in a former action, and were judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies,

---

[1]On January 7, 1958, the following interchange took place between David Warner (attorney heading Department of Justice legal team during the trial) and Special Master, Simon Rifkind:

THE MASTER: ". . . The question is whether the maps constitute the definition of what you regard as irrigable . . ."

MR. WARNER: "Well, Your Honor, that is how we are defining 'irrigable' for the purpose of proving the claim that is being asserted."

THE MASTER: "And although there may be other irrigable lands within those reservations, those you do not lay any claim for the service of water upon?"

MR. WARNER: "That is correct."

THE MASTER: "All right. That is what we know, and that is the way we are going to be bound. This is a statement that I will take seriously."

(See Transcript of the Proceedings before Special Master Rifkind, pp. 14,155).

regardless of the form that the issue may take in the subsequent action. [See, *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Morris v. Jones*, 329 U.S. 545 (1947); *Heiser v. Woodruff*, 327 U.S. 726 (1946); *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316 (1927); *Davis v. McKinnon & Mooney*, 266 F.2d 870 (6th Cir., 1959); and Moore, *Federal Practice*, Vol. 1B, p. 624, Section 0.405 [1].]

The rule of collateral estoppel provides that where two actions are on different causes of action, the earlier judgment is conclusive, not only as to issues actually determined in the prior action, but also as to other matters which were necessary to the decision. [See, *Southern Pacific R.R. Co. v. United States*, 168 U.S. 1 (1897); *Sutphin v. Speik*, 15 Cal.2d 195, 99 P.2d 652 (1940).]

Special Master Tuttle's order permitting introduction of evidence as to any land which the United States now contends was omitted from the earlier presentation of practicably irrigable lands within the 1964 boundaries violates the spirit and principle of the doctrines of *res judicata* and collateral estoppel, and results in irrevocable injury to the State Parties. The introduction of evidence by the United States for the purpose of recalculating practicably irrigable acreage on alleged omitted lands will subject the State Parties to uncertainty and confusion in legal relations that were defined in the 1964 Decree, harassment and vexation resulting from a second lawsuit on the same issues, and irretrievable economic expense entailed in pretrial and trial preparation required to refute the asserted claims for additional allocations of water.

### D. Article IX of the Court's 1964 Decree Does Not Authorize Relitigation of Practicably Irrigable Acreage Within the 1964 Boundaries

The United States' attempt to relitigate practicably irrigable acreage within the 1964 boundaries in the original lawsuit under Article IX of the 1964 Decree is a procedural ploy designed to circumvent the doctrines of *res judicata* and collateral estoppel. As the above authorities indicate, these doctrines would clearly bar any such attempt made in a separate lawsuit. They should also apply here under the rule that a judgment may be final even though a party is given leave to apply to the trial court for its modification. *Stovall v. Banks,* 77 U.S. 583 (1870). The attempt at relitigation of issues in the context of the original suit is no more warranted than it would be in a new suit.

The United States has attempted to justify the motion procedure in the original case with the language of Article IX of the 1964 Decree. Article IX does not permit the parties to change the final, adjudicated portions of the Decree. Adopting the United States' interpretation of Article IX would result in interminable litigation between the parties. Article IX does, however, serve a legitimate purpose; it reserves jurisdiction to the Court to adjudicate matters that have not been finally determined. The calculation of practicably irrigable acreage within the undisputed reservation boundaries was finally determined and set forth in Article II of the 1964 Decree and is therefore not subject to the Court's continuing jurisdiction under Article IX.

The above conclusion is amply supported in the Report of Special Master Rifkind. The Special Master advocated a *finite* decree, as opposed to an open-ended decree, that would establish a water right for

each of the five reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the reservation and to satisfy related stock and domestic users. (Special Master's Report, December 1960, pp. 263-265.) A finite determination of reservation water rights was considered necessary by the Special Master so that in time of shortage the Secretary of the Interior would know how much water to release to satisfy his delivery obligations according to priority. (Report of Special Master, December 1960, pp. 255-256.) The Special Master emphasized his concern:

> "This will preserve the full extent of the water rights created by the United States and will establish water rights of *fixed magnitude* and priority *so as to provide certainty* for both the United States and non-Indian users." (Emphasis added.) (Report of Special Master, December 1960, p. 265.)

In his same report, the Special Master recommended adoption of a decree containing the identical Article IX which the United States now relies upon in arguing that recalculation of practicably irrigable acreage is permitted and that water rights have not been fully determined for the 1964 boundaries. (Report of Special Master, December 1960, p. 360.) Surely the Special Master did not attach such a meaning to Article IX, nor did the Court. Referring to claims of the United States, the Court stated:

> "While the Master passed upon some of these claims, he declined to reach others, particularly those relating to tributaries. We approve his decision as to which claims required adjudication, and likewise *we approve the decree he recommended for the government claims he did decide.*"

(Emphasis added.) (Opinion of the Court, *supra* at 595.)

The Court also adopted the same Article IX proposed by the Special Master. [Decree of the Court, 376 U.S. 341, 353 (1964).]

The State Parties contend that this Court intended Article IX to reserve jurisdiction only over matters not finally determined and that it did, in Article II of the Decree, finally adjudicate irrigable acreage within the 1964 boundaries, as recommended by the Special Master. Such adjudication is not subject to the Court's continuing jurisdiction under Article IX.

### E. No Proper Equitable Basis for Special Master Tuttle's Order Permitting Relitigation, in Disregard of the Doctrines of Res Judicata and Collateral Estoppel, Was Presented and Said Order Will Result in Grievous Harm to the State Parties

Assuming *arguendo* that certain lands, as the United States asserts, were in fact omitted from practicably irrigable acreage calculation before Special Master Rifkind, the doctrine of *res judicata* makes a final, valid judgment conclusive on the parties, and those in privity with them, as to all matters, fact and law, that were or should have been adjudicated in the proceeding. Thus, the doctrine of *res judicata* precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein. See, *Partmar Corp. v. Paramount Theatres Corp.*, 347 U.S. 89 (1954), reh. den. 347 U.S. 931 (1954). A

valid judgment is the final judicial settlement regardless of whether all the grounds of recovery available have been put forward and even though the parties may have lacked knowledge of their complete legal rights therein. See, *Anselmo v. Harden,* 253 F.2d 165 (3rd Cir. 1958); *McIntosh v. Wiggins,* 123 F.2d 316 (8th Cir. 1941), cert. den. 315 U.S. 831 (1942); *Filice v. United States,* 271 F.2d 782 (9th Cir. 1959), cert. den. 362 U.S. 924 (1960).

In disregard of the doctrines of *res judicata* and collateral estoppel, Special Master Tuttle has deferred his ruling on the appropriateness of the "omitted land" claims. Permitting relitigation of this issue will subject the State Parties to just those inequities sought to be prevented by the doctrines of *res judicata* and collateral estoppel.

The State Parties recognize that the principles of *res judicata* and collateral estoppel may not be invoked to sustain a judgment procured by fraud and collusion. [See, *New Orleans v. Gaines,* 138 U.S. 595 (1890); *Fiske v. Buder,* 125 F.2d 841 (8th Cir. 1942); *Jeffords v. Young,* 98 Cal.App. 400, 277 P. 163 (1929).] A court may grant appropriate equitable relief from a judgment that is procured by fraud and collusion. Not having produced evidence that the 1963 judgment in this case was procured by fraud or collusion, the Tribes are not entitled to such exercise of the Court's equitable power.

The potential grievous impact of the repetitious litigation on the legally protected interests of the State Parties is magnified due to the finite quantity of Colorado River water. Pursuant to a body of law applied to the Colorado River, which has evolved out of a combination of federal statutes, interstate compacts,

court decisions and decrees, contracts with the United States, and an international treaty, its limited water has been completely allocated. Therefore, every additional acre-foot of water claimed by an Indian tribe means potentially one acre-foot less for one of the State Parties. In addition to the enormous sums of money at stake to replace loss of water supply, there is a real possibility that alternative sources of water may not be available to those State Parties whose rights are diminished.

The potential grievous impact on the State Parties resulting from recalculation of practicably irrigable acreage is well represented by the special interests of The Metropolitan Water District of Southern California and the State of Arizona. Because of Metropolitan's priority position in the 1931 intrastate Seven-Party Water Agreement (See, *the Hoover Dam Documents,* Wilbur and Ely (1948), Appendix 1003), establishing priorities of delivery among California agencies, increased Indian entitlements to Colorado River water will potentially reduce Metropolitan's entitlement. In addition, Metropolitan will be affected by the shortage in yield of the California State Water Project in the late 1980s just when its entitlement to Colorado River water is reduced as a result of completion and operation of the Central Arizona Project. At that time, unless major actions can be taken by California to increase the yield of the State Water Project to meet the required deliveries, Metropolitan's firm water supply will be insufficient to meet the estimated demands of the eleven million residents of its service area. Thus, a sizeable reduction in Metropolitan's Colorado River water supply in addition to that following commencement of operation of the Central Arizona Project will further impair its ability to meet its demands beginning in the late 1980s.

In Arizona, construction of the Central Arizona Project (CAP) is currently progressing. Plans for the CAP included water supply calculations of water available for delivery through the project. The Central Arizona Water Conservation District, created by the Arizona Legislature to contract with the Secretary of the Interior, entered into a contract with the Secretary and imposed taxes on property owners within three counties in Arizona to ensure repayment to the United States. The Arizona Water Commission has delivered to the Secretary of the Interior its recommendations for the allocations of municipal and industrial water to users requesting such water and is now considering staff recommendations for allocations of agricultural water.

All of the construction expenses, taxes, and allocations of water have been based on the expected supply which was determined by reliance on this Court's 1963 Opinion and 1964 Decree, including entitlements therein made to the five Tribes which the United States now seeks to relitigate. The Arizona Water Commission recommended to the Secretary of the Interior that 500,000 acre-feet be allocated to municipal and industrial users. If the Tribes obtain another 93,380 acre-feet of water rights (as claimed under recalculation in Arizona), this will reduce that allocation by approximately one-fifth. It will also decrease the supply allocated to five *other* Indian tribes in Central Arizona to be delivered through the CAP.

Special Master Rifkind specifically adopted the practicably irrigable acreage test to provide certainty and stability for the State Parties and others which serve approximately 12 million people and hundreds of thousands of acres of prime farm land. The United States' characterization of the recalculation of irrigable acreage

as "relatively minor adjustments" (U.S. Motion, p. 29) does not accurately indicate the potential impact of such changes on the State Parties. In the event the Court grants the requested modification and permits 114,655 acre-feet of additional diversions annually chargeable against Arizona, California, and Nevada, the increased Indian Tribe allocation to Colorado River water could reduce the allocation of those State Parties which have contracts with the United States for delivery of Colorado River water.

Special Master Tuttle's order postponing a ruling on the propriety of so-called "omitted lands" claims, but nevertheless allowing a full evidentiary presentation as to such claims, is, in effect, a ruling that such claims can be considered under Article IX of the 1964 Decree. Such a result, if permitted to stand, would transform Article II into an open-ended provision. In order to fully protect their interests, the State Parties under an open-ended decree would properly demand, and would logically and equitably be afforded, the reciprocal right to relitigate all the reservation irrigable acreage issues originally presented before Special Master Rifkind, as well as the question of the proper date as of which practicably irrigable acreage should be determined. In addition, the strategy of the parties in presenting their positions before the previous Special Master was based, in part, on the claims then being asserted by the United States. Indeed, the State Parties chose not to contest the presentation of practicably irrigable acreage on the reservations. To permit the United States at this late date to augment its claims within the conceded boundaries without permitting the State Parties the right to relitigate the determinations of irrigable acreage would be a great injustice. The

resulting wasted effort and expense in judicial administration entailed in such relitigation is one of the abuses sought to be remedied by the doctrines of *res judicata* and collateral estoppel. A trial before Special Master Tuttle would necessarily involve pretrial discovery, consultants' expenses, presentation of witnesses, cross-examination, rebuttal witnesses, legal arguments, and briefing. A ruling from this Court at this time may well obviate the necessity for the large investment of time and money.

Apart from the public policy considerations behind the doctrines of *res judicata* and collateral estoppel, the patent invalidity of the United States' position based on the erroneous concept of omitted lands invites review by this Court at the earliest possible date. The 1964 Decree did not allocate water to specific lands within the respective reservations. The Decree only fixes the total amount of water available to each reservation. There were no findings as to what specific lands were irrigable and such lands cannot be identified from the findings. Because the water allocated was not directly tied to any described land, Special Master Rifkind made no determination as to what land was "included" and what land was "omitted" in his qualification of practicably irrigable acreages.

The interests of the State Parties in certainty in their legal rights to Colorado River water, freedom from repetitious, harassing, and expensive litigation must not be sacrificed to compensate the Tribes for alleged inadequate representation in the original lawsuit. It must be borne in mind that the United States was diligent and comprehensive in advancing the interests of the Indian Tribes in the original case. Indeed the substantial water allocations awarded the Indians reflect

the great competency of their representation by the government. The present independent counsel of the Indian Tribes concede the current representation by the United States is no less competent. Even assuming *arguendo* the Tribes were inadequately represented by the United States in the original lawsuit, they are not without a remedy; they may institute suit against the United States for monetary damages in the United States Court of Claims. (28 U.S.C. 1505.)

In order to avoid a costly and unnecessary trial, it is respectfully requested that the Court direct the Special Master to rule on the issue of *res judicata* as applied to the United States' claims of "omitted lands" or, in the alternative, rule itself on that issue.

## II

## SPECIAL MASTER TUTTLE, IN ACCEPTING THE DISPUTED RESERVATION BOUNDARIES URGED BY THE UNITED STATES AND PROCEEDING TO TRY THE ISSUE OF PRACTICABLY IRRIGABLE ACREAGE WITHIN THE ADDED LANDS FOR PURPOSES OF INCREASING THE WATER ALLOCATIONS FOR THE RESERVATIONS, IS ACTING CONTRARY TO THE COURT'S 1964 DECREE ALLOWING ADJUSTMENT OF WATER ALLOCATIONS ONLY WHEN THE DISPUTED BOUNDARIES HAVE BEEN FINALLY DETERMINED

### A. Introduction

The motions of the United States and the five Indian Tribes for modification of the Court's 1964 Decree allocating water to the respective Indian reservations include claims of additional water entitlements based upon asserted restoration of Indian lands through "final" resolution of boundary disputes. (U.S. Motion, pp.

8-17.) Ordinarily, it would be satisfactory for the parties whose rights are jeopardized by these claims to await action by the appointed Special Master on the merits of these claims before seeking relief for error committed by the Special Master. In the present situation, however, a preliminary ruling of the Special Master so prejudices the State Parties that a review by the Court is essential at this time in order that said Parties be afforded their day in court.

Stated briefly, the claims of the Indian Tribes to additional water based upon additional reservation lands are dependent upon two factors: first, a favorable determination of disputed boundaries; and second, a determination of practicably irrigable acreage within such added lands. The Special Master by order of August 28, 1979, has precluded the State Parties from challenging the reservation boundaries advanced by the United States and the Tribes and will proceed to hear evidence on practicably irrigable acreage within the added lands. He has accepted certain administrative orders of the Secretary of the Interior and court decrees, in which the State Parties were not represented, as constituting final determinations of disputed reservation boundaries. This ruling is particularly anomalous when one considers that in the original proceedings before the previous Special Master leading to the Court's decision in 1963 and Decree in 1964, the parties conceded the boundary dispute to be a proper issue and, following full hearings, the findings of the Special Master were, in the main, favorable to the State Parties. (Report of Special Master, December 1960, pp. 254-287.) Although these findings were rejected for purposes of title determinations, they were the basis for the reservation water allocations determined by the Special Master and ac-

cepted by this Court. (Opinion of the Court, *supra* at 601.)

In the following argument we will demonstrate that while the Court in its 1964 Decree provided for the possibility of adjustment of the water allocations decreed for the reservations "in the event that the boundaries of the respective reservations are finally determined" (Decree of the Court, *supra* at 345), it did not intend that the disputed boundaries issue could be resolved by unilateral action of only one of the sides to the water entitlement controversy.

Moreover, a serious question exists as to whether the States Parties would have standing to challenge the boundary determinations made by the Secretary of the Interior in another judicial proceeding. Hence the Special Master's ruling may preclude challenge to those determinations by the parties whose water rights are directly affected.

Accordingly, it is essential that the Special Master be directed to allow the disputed boundaries question to be tried as a pre-requisite to any trial of alleged practicably irrigable acreage within claimed added reservation lands.

### B. Significance of the Disputed Reservation Boundaries Issue

In order to fully appreciate the significance of the erroneous ruling of the Special Master in accepting as binding upon all the parties, for purposes of revising the water allocations, the disputed boundaries advanced by the United States and the Tribes, it is necessary to consider the litigation context in which this question originated.

The instant case arose in 1952 essentially to apportion the waters of the Colorado River among the States of Arizona, California, and Nevada. The United States intervened to assert its various interests. With respect to claims of the United States, the issues included allocations of water to five Indian reservations based upon their *Winters* doctrine rights,[2] although that part of the case was secondary compared with the other issues. Nevertheless, the issues relating to water entitlements of the Indian reservations were fully tried. These issues involved disputed boundaries of two reservations and the amount of practicably irrigable acreage of each of the reservations (Opinion of the Court, *supra*, at 600-601.) Following trial, the Special Master made rulings in favor of the California position on the disputed boundaries, except for two instances involving avulsive changes of the river, and determined the practicably irrigable acreage within the determined reservations and allocated water accordingly. His determinations were incorporated in his report to the Court. (Report of Special Master, December 1960, pp. 254-266.)

In these earlier proceedings, it was readily seen by all parties that rulings on water entitlements for the reservations necessarily involved boundary adjudications where the boundaries were in dispute, for the water entitlements are dependent in part upon the extent of the reservations. Unfortunately, it was not realized until the proceedings before the Special Master were completed that private individuals had an interest in the adjudication of reservation boundaries and they were not parties in the case. For this reason, the

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[2]*Winters v. United States, supra*, 207 U.S. 564 (1908).

California parties in their brief before the Court urged rejection of the Special Master's boundary determinations. (*See* Opening Brief of the California Defendants in Support of their Exceptions to the Report of the Special Master, dated May 22, 1961, at pp. 279-282.) The Court was essentially faced with the dilemma of a water rights adjudication that necessarily involved boundary or title adjudications but which lacked necessary parties. Rather than remand the case for new proceedings, the Court rejected the boundary adjudications but adopted the Special Master's water allocations based upon his boundary determinations.

> ". . . The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.
>
> We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave [sic] Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." (Opinion of the Court, *supra*, at 601.)

In short, the Court made the best of an unfortunate situation but recognized by way of Article II(D)(5) of its Decree that the matter was not being fully laid to rest.

> ". . . the quantities fixed in this paragraph [Fort Mojave Indian Reservation] and paragraph (4) [Colorado River Indian Reservation] shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the

boundaries of the respective reservations are finally determined." (Decree of the Court, *supra*, at 345.)

The instant argument concerns the meaning to be given to the above statement of the Court and, particularly, the words "finally determined".

### C. Interpretation of the Court's Intent in Providing for Adjustment of Reservation Water Allocations

Special Master Tuttle by his Memorandum and Report has ruled that certain orders of the Secretary of the Interior and judgments in actions in which the State Parties were not represented, meet the Court's test of final determination of disputed reservation boundaries.

> "I conclude that the determinations that have been made with respect to the stated boundary changes may be accepted as final for the purpose of considering additional allocations of water rights to the reservations". (Memorandum and Report, p. 36.)

In so ruling, the Special Master is irremediably prejudicing the parties contesting the additional water claims of the Indian Tribes. As we have pointed out, the claims based on lands allegedly restored to the reservations depend on a two-step process. First, the United States must establish that the added lands are, in fact, part of the reservations. Secondly, it must establish that such lands contain practicably irrigable acreage. The Special Master has relieved the United States from meeting the first requisite of these claims.

A number of considerations will show that the Special Master is in error in so interpreting the Court's 1964

Decree providing for adjustment of water allocations upon final determination of disputed reservation boundaries.

**(1) Orders of the Secretary of the Interior**

The Special Master adopted completely the position urged by the United States that the June 3, 1974 Order of the Secretary pertaining to the Fort Mojave Reservation, the January 17, 1969 Order of the Secretary pertaining to the Colorado River Reservation, and the December 20, 1978 Order of the Secretary pertaining to the Fort Yuma Reservation, are the "final determinations" of the disputed reservation boundaries intended by the Supreme Court in Article II(D)(5) of its 1964 Decree.[3] We submit this conclusion cannot stand up to reason.

First, the Supreme Court was well aware that the boundaries of the Fort Mojave and Colorado River Indian Reservations were disputed and when subjected to the truth-seeking procedures of trial, the essential position of the United States was defeated. While the Court did not feel the boundary adjudications were appropriate in the water rights suit, it nevertheless adopted the Special Master's allocations of water for the reservations based upon his boundary determinations. Hardly, then, is it reasonable to infer that the Supreme Court's reference, to "final determination" of the disputed boundaries, merely contemplated unilateral pronouncements by one of the adversary parties to the boundary disputes. Yet that is the interpretation placed on the Supreme Court's language by the Special

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[3]Although Article II(D)(5) of the 1964 Decree refers to the disputed boundaries of only two reservations, the State Parties have not objected to its application to the other reservations as well.

Master in his accepting Secretarial orders as binding determinations of disputed boundaries. It is totally unreasonable to conclude that the Court intended invaluable water rights to turn upon administrative actions of one party to a legal dispute, especially where that party, with two minor exceptions, had not succeeded after full trial of its position.

Moreover, if administrative action of the United States was all that was required to resolve the boundary disputes of the different reservations, did not the Court already have that, in substance, by way of the pleadings and position put forth by the United States in the original proceedings in 1956? To argue that what was lacking for "final determination" of each reservation boundary dispute was merely an appropriate order of the Secretary of the Interior is to accuse the Supreme Court of putting form over substance. Clearly, it was not administrative action of the United States that was intended by the Court when it provided for adjustment of water allocations should the disputed reservation boundaries be "finally determined," but, rather, determinations of an impartial tribunal. Indeed, that has been the traditional manner of resolving disputes in our system of government.

Nor should we overlook what has become the essentially transitory nature of the administrative actions that the United States would have us believe are the "final determinations" of reservation boundaries intended by the Court to allow water allocation changes. The unilateral action taken by the Secretary of the Interior is almost shocking in the case of the December 20, 1978 Secretarial order relating to the Fort Yuma Reservation. In this case, three previous Department of the Interior Solicitor opinions over a forty-one

year period (Margold-1936, Weinberg-1968, Austin-1977) had found invalid the Indian claim to enlarged reservation boundaries. The last of the three was issued only after the State Parties and representatives of the Indians' position had been afforded opportunity to argue the matter before then Solicitor Austin. Recently, Solicitor Krulitz has summarily reversed Solicitor Austin's opinion, finding the Indian claim to be valid, and the Secretary of the Interior has made an Order to that effect. The Krulitz opinion as issued without any prior notice or opportunity to be heard by the State Parties. The Fort Yuma Secretarial order was issued the same day as the opinion, followed the next day by the filing of the United States' motion to modify the water allocations. One wonders how any Secretarial order could ever be considered "final", even for administrative purposes within the Department, when the underlying Solicitor opinions may vary in conclusion from one occupant of that office to the next. The ultimate absurdity is the apparent contention by the United States that somehow the December 20, 1978 Secretarial order became final the minute it was issued.

Finally, it should be observed that this Court's recent order of January 9, 1979, granting a joint motion of the parties for entry of a supplemental decree determining miscellaneous present perfected rights in this case, after directing satisfaction of all rights of the five Indian reservations in time of shortage, states:

> ". . . provided that the quantities fixed in paragraphs (1) through (5) of Article II(D) of said [1964] Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court *in the event that the boundaries of*

*the respective reservations are finally determined. . . .*" (Emphasis added) (58 L.Ed.2d 627 [1979].)

There can be little doubt, in view of the language italicized above, that the parties in requesting entry of this order and the Court in making the order regarded the reservation boundary questions still unresolved. If the disputed boundaries had already been "finally determined," it would not make sense to so word the proviso. Yet the administrative actions and the judicial rulings relied upon by the United States and adopted by the Special Master as final determinations of the reservation boundary disputes occurred prior to entry of the above order, several years before, in most instances.

In treating these orders of the Secretary of the Interior as final determinations of the boundaries, thereby adding reservation lands which in turn became a basis for claims to additional water, the Special Master is permitting the United States to accomplish what it could not achieve through trial—establishing the validity of the reservation boundaries it asserts. The inequity to those whose water supply will be affected, in denying them the opportunity to protect their interests, is all too plain. We should not ascribe such an intention to this Court in interpreting the subject provision.

**(2) Federal Court Cases Involving Reservation Boundaries**

In addition to Secretarial orders, the United States relies upon and the Special Master has accepted certain federal court adjudications involving ownership or possession of land claimed to be part of an Indian reservation (U.S. Motion, pp. 17-23; Memorandum and Report, p. 36.) Again, in accepting the position of

the United States that the effect of these cases is to "finally determine" disputed reservation boundaries for purposes of water allocation adjustment, the Special Master is depriving the parties who will be affected by the water allocation adjustments of the opportunity to protect their interests. The State Parties did not claim title to any of the boundary lands in dispute in the original proceedings in 1956 and make no claim of ownership today. Yet in 1956 they were able to challenge the reservation boundary claims of the United States in order to protect their water entitlements. We agree with the United States and the Special Master that this is a water rights case, not a land title suit. We do not seek to challenge title determined in any of the cases relied upon by the United States. On the other hand, not having been parties to those actions, we should not be bound by those adjudications. And, particularly, we should not be bound by those boundary determinations insofar as they affect consequential water rights. In short, under the doctrine of *res judicata* the parties to those actions are properly bound by title determinations but those who were not parties are free to adjudicate the proper boundaries in a separate action to establish water rights which depend, in part, on the true reservation boundaries.

The rule denying the right to apply the doctrine of *res judicata* against strangers to the prior action is based upon principles of justice, fairness, and requirements of due process of law. See *Bruszewski v. United States*, 181 F.2d 419 (3rd Cir. 1950), cert. den. 340 U.S. 865 (1950); *Graves v. Associated Transport, Inc.*, 344 F.2d 894 (4th Cir. 1965); *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942). The reason for the rule is based on the fact that

a stranger to an action does not have the opportunity available to the parties to prove or ascertain the truth of the questions at issue. See, *Hale v. Finch*, 104 U.S. 261 (1881). The justification for this rule is well illustrated by the large number of stipulated judgments confirming tribal title that have been entered in federal court cases[4] following the 1964 Decree. We believe that in the absence of these stipulated judgments, it is unlikely that the non-Indian litigants would have had any water supply for their land. In contrast to these stipulated judgments, it is noteworthy that in the adversary proceedings before the previous Special Master, the major boundary claims asserted by the United States were defeated.

Similarly, the rule of collateral estoppel does not operate to affect strangers to a judgment, that is, to affect the rights of those who are neither parties nor in privity with a party. See *Gratiot County State Bank v. Johnson*, 249 U.S. 247 (1919); *Greene v. General Foods Corporation*, 517 F.2d 635 (5th Cir. 1975).

Thus neither of these doctrines bar the State Parties from contesting the asserted reservation boundaries in this case.

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[4]Stipulated judgments were entered in the following cases: *United States v. Denham*, 73-495-ALS (U.S. D.C., 1975); *United States v. Curtis*, 72-1624-DWW (U.S. D.C., 1977); *Cocopah Tribe of Indians v. Rogers*, 70-573-PHX-WEC (1975); *United States v. Brigham Young University*, 73-3058-DWW (U.S. D.C., 1976).

**D. Reasoning of the Special Master in Support of His Ruling**

The Special Master correctly sets forth the relevance of the boundaries to the ultimate issue of the case—*Winters* doctrine water allocations (Memorandum and Report, p. 37). To make water allocations that depend on practicably irrigable acreage it is essential to know the extent of the reservations. The Special Master then states "The model of the previous treatment of the boundary determinations by the court itself much weakens the contention of the State Parties." Examination of the previous treatment of the boundary determinations, however, strengthens rather than weakens our position. Although the Court rejected the previous Special Master's attempt to adjudicate the boundary disputes, *per se,* it did not reject such determinations by the Special Master for purposes of calculating water allocations for the reservations in question. This is precisely what the State Parties wish to do here. There is no less reason today for the United States to establish through trial that the lands for which it claims additional water are within the respective reservations than there was in the 1956 proceedings, the model referred to by Special Master Tuttle.

The Special Master reasons further that the Court, in rejecting the proposed adjudication of the reservation boundary disputes, indicated it was adequate to settle title disputes elsewhere and merely left open for future adjustment the water allocations based upon such resolutions of the boundary disputes (Memorandum and Report, p. 38). Two observations are appropriate in this regard. First, while the Court did imply that the reservation boundary disputes may be adjudicated elsewhere, it by no means precluded their resolu-

tion in this Court in appropriate circumstances. Assuming the feasibility of joining the necessary parties claiming title adverse to the United States, such a course has much to commend it. Secondly, and more pertinent to the ruling of the Special Master prohibiting the State Parties from challenging the boundaries asserted by the United States, is the fact that nothing in the Court's decision permits the return to this Court to seek adjustment of the reservation water allocations without *first* establishing that the boundary disputes have been "finally determined". Yet this is precisely the position of the United States. It argues resolution of the boundary disputes is not proper in this Court but has not shown final determinations have been obtained elsewhere. It relies merely on its own actions, Secretarial orders and stipulated judgments for the most part. We have indicated above why such orders and judgments are not the final determinations intended by the Court as a condition to seeking modification of the decreed water allocations.

The Special Master interprets the Court's decision as contemplating that the Court might be called upon to settle title disputes; this could result from someone initating litigation to establish title in order to be entitled to water; it would not be litigation instituted by anyone seeking a collateral determination of title. (Memorandum and Report, pp. 38-39.) However that may be, it does not follow that the United States may dispense with the prerequisite of establishing that the added land for which it demands additional water is within the reservation. Since that has not been established elsewhere by adjudication binding on the State Parties, it would have to be established in these proceedings if the additional water claims of the United

States are to be further considered. In this regard, we have noted that Special Master Rifkind in 1956 tried the boundary disputes as a necessary incident to determining water allocations for the reservations. None of the parties challenged his authority to do so, although they ultimately differed as to whether that determination could properly be for title purposes or only for the purpose of allocating water.[5] The order appointing the current Special Master is identical to that appointing the Special Master in 1956, with regard to such authority.

The Special Master points out that in the administration of public lands, the United States may survey, resurvey and adjust its surveys, and notes that none of the State Parties makes claim to land in any of the disputed areas (Memorandum and Report, p. 40).

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[5]Ironically, it was the United States that then insisted that boundary determinations be binding adjudications for title as well as water allocation purposes:

"In the process of determining the irrigable acreage of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation and the consequent quantity of the water rights to be decreed for these Reservations, the Special Master had to resolve disputes between the United States and California concerning the proper location of the western boundary of each of these Reservations.

. . .

The determination of the boundary of each Reservation is an essential prerequisite to the determination of the quantum of the water rights for that Reservation. There is no question of the Court's jurisdiction to resolve boundary questions nor of the authority of California to act as *parens patriae* for its citizens in such matters. *Rhode Island v. Massachusetts*, 37 U.S. 657. We oppose the disclaimer proposed by California because of its possible derogative effect upon the water rights herein decreed by the United States." (Answering Brief of the United States, August 1961, pp. 94-95.)

The California parties' 1961 Opening Brief specifically urged the Court to refrain from adjudicating title, pointing out that individual land claimants who would be affected were not parties to the proceeding.

He then concludes that the interest of the State Parties is met by allowing a reduction, *pro tanto*, of the reservation water allotment should it be determined in subsequent title litigation that any of the lands found practicably irrigable are not within the respective reservations. This conclusion is curious indeed. The party seeking additional water based upon disputed reservation lands will not first have to establish the lands are part of the reservation; rather, this element of the cause of action will be presumed based upon the unilateral administrative actions of that *same* party. On the other hand, the adversary party will only have the opportunity at some later time, if at all, to seek adjustment of the water allocation in the event that someone else's litigation establishes the lands in question are not, in fact, part of the reservation.

This unique approach is the very opposite to that taken by the Court in the 1964 Decree. Special Master Rifkind had determined the disputed reservation boundaries through adversary proceedings, not by passive acceptance of administrative determinations of federal agencies. Only then did he determine the water allotment for the delineated reservations. The Court approved this and provided for future adjustment should title of disputed lands be subsequently settled. The current Special Master would turn this about and award water allotments based upon what are essentially the mere assertions of the United States, without requiring the disputed boundaries be judicially established, and place the burden upon the parties whose water supply will be adversely affected to seek adjustment in the event of a later title adjudication reducing the reservations. We submit that no precedent exists for this result, and our standards of justice require its rejection.

In his concluding comments on this issue, Special Master Tuttle adopts the position put forward by the United States, to wit:

> "It would be wholly arbitrary to consider the Reservation boundaries as they were understood in 1964 to be sufficiently 'determined' to support a specific water allocation calculated on acreage—albeit no court judgment has ever vindicated the survey—but to deny comparable affect (sic) to subsequent dependent surveys of the boundaries because no court had approved them." (Memorandum and Report, p. 41.)

What the Special Master is saying, in accepting the argument of United States (U.S. Motion, pp. 13-14) is that since some of the administrative actions of the United States establishing boundaries of Indian reservations were not challenged and therefore were used in the calculation of the water allocations for those reservations, it would be inconsistent and therefore wrong to treat comparable administrative actions of the United States regarding boundaries of other reservations differently. A moment's reflection will disclose the flaw in such reasoning.

As we have noted, the burden of the United States, in the proceedings culminating in the 1964 Decree of the Court, as well as today, in establishing the water entitlements for the reservations, is to prove two elements: (1) that the acreage for which *Winters* doctrine water rights are claimed is within the reservation boundaries; and (2) that it is practicably irrigable. The adversary parties may, of course, contest both of these elements. But it does not follow that they must contest the situs of the acreage in question as to each reservation in order to contest that element as to a particular

reservation. The contrary conclusion would require needless and therefore wasteful trial proceedings. In fact, the State Parties in the 1956 proceedings disagreed with the boundaries asserted by the United States only for the Fort Mojave and Colorado River Indian reservations. They properly contested those boundaries but not those asserted for the remaining three Indian reservations. No one contended, then, that in so proceeding the Special Master and the State Parties were being arbitrary with regard to the judicial respect owed the administrative determinations of the different reservation boundaries. It is no more sound to so conclude today.

The fact that a party does not challenge a particular reservation boundary is not an indication or concession that such administrative determinations are final or binding but merely that the opposing party is willing to accept it for purposes of the litigation at hand. Such a decision in litigation has no bearing on the legal effect of similar administrative determinations and the right of a party to challenge them.

We have pointed out in our Response to the Motion of the United States for Modification of Decree that administrative determinations such as Secretarial orders relied upon by the United States are not the products of hearings or proceedings in which persons adversely affected have the opportunity to present, by evidence and argument, their views. The Department of the Interior, Office of the Solicitor, in a letter dated January 3, 1979, states there are no administrative procedures available to challenge Secretarial orders and that review of such matters must take place in a judicial forum. (A copy of said letter marked Exhibit A is attached to our Response to the Motion of the

United States for Modification of Decree, dated February 14, 1979.) However, a person suffering a legal wrong because of action of a federal agency is entitled to judicial review of that action. (See 5 U.S.C. 702; *Chicago v. United States,* 396 U.S. 162 (1969); *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967); *Citizens Ass'n. of Georgetown, Inc. v. Zoning Com'n. of D.C.,* 477 F.2d 402 (D.C. Cir. 1973); *Gordon & Co. v. Board of Governors of Fed. Reserve Sys.,* 317 F. Supp. 1045 (D. Mass. 1970).) Therefore, the Secretarial orders relied upon by the United States may be functional for administrative purposes of the federal government but cannot be considered final for the purpose of establishing claims for Indian reservation water entitlements adverse to the State Parties. The United States, not having obtained final determinations of the disputed reservation boundaries in another judicial forum, must do so in these proceedings if they are to proceed with their claims to additional water allocations based upon expanded reservation boundaries.

### E. Standing of the State Parties to Challenge the Secretary's Determinations of Disputed Boundaries in Other Proceedings

In accepting the Secretarial orders and judgments as final determinations of disputed reservation boundaries for the purposes of allocating additional water, the Special Master is seriously inhibiting the State Parties' ability to protect their interests. We have already pointed out that the Secretary of the Interior does not afford any administrative opportunity for challenging his orders and that we were not parties to the litigation relied upon. Thus, we must look to a judicial

forum to challenge these actions of the Secretary fixing reservation boundaries which affect our water rights. But it is by no means clear that we have standing to raise such issues. The Special Master notes, "I am aware of no claim to land in any of the disputed areas by any of the State Parties." (Memorandum and Report, p. 40). His earlier statements, disclaiming any determination of the correctness of the boundary lines he is accepting or that the cited boundary litigation is *res judicata* as to those who were not parties, do nothing to alleviate the problem of standing.[6]

The United States, too, has recognized the existence of the standing question. In argument, on October 10, 1978, before this Court on the Joint Motion for Entry of a Proposed Supplemental Decree and the intervention motions of the five Tribes, Louis F. Claiborne, Office of the Solicitor General, responded to a question on the boundary changes posed by Mr. Justice White.

Mr. Justice White: "Are those boundaries subject to attack in the district court now or not?"

Mr. Claiborne: "A difficult question, Mr. Justice White. . . . we would wonder who had standing to challenge them—that is, the boundaries. . . . The states—this is all public domain land, it is not state land—in principle have no standing. They may say that because it affects their water allocation, therefore they are a party aggrieved and therefore they have

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[6]"I make no findings with respect to titles to the land involved, either as to private claimants or as to any other contestant over the correctness of the boundary lines. Nor do I consider that the acts of the Secretary or of the courts in private litigation are *res judicata* of the boundaries as to present litigants who were not parties to such proceedings." (Memorandum and Report, p. 36).

standing. That would be a matter for debate, as to which I do not want to make binding concession. But it is a close question." (Transcript, pp. 61-62).

Thus, although the water rights of the State Parties are affected by the actions of the Secretary of the Interior in his determinations of disputed reservation boundaries, those parties may have no forum in which to challenge those determinations.

On the other hand, this question of standing is eliminated in the instant proceeding. All the parties whose water rights may be affected by the boundary determinations are before the Court. Therefore, the State Parties urge that this Court direct the Special Master to receive evidence, hear legal arguments, and resolve each of the boundary disputes. This approach is the only fair and expedient way to resolve the boundary lands claims. If the Special Master is not directed to resolve the boundary disputes, then the State Parties, assuming they are successful in surmounting the standing obstacle, must challenge the boundary determinations piecemeal in the district courts. Years could pass before every dispute is finally determined through the appellate process; and then any dispute resolved favorably to an Indian tribe would still have to come back to this Court for a determination of practicably irrigable acreage and establishment of water rights. By contrast, this Court, through the Special Master, can now resolve all the disputes at one time, and establish water rights where appropriate. The State Parties assert that this is the proper lawsuit in which the boundary disputes underlying water rights claims central to this case must be resolved and that so proceeding would be in the interests of all parties.

## III

## THE SPECIAL MASTER ERRED IN RULING THAT THE FIVE INDIAN TRIBES BE PERMITTED TO INTERVENE AND BE REPRESENTED BY INDEPENDENT COUNSEL

### A. Introduction

The Special Master has allowed unconditional intervention by the five Indian Tribes so as to result in dual representation of tribal interests by the Tribes themselves and by the United States as trustee. In so doing, the Special Master has erroneously disregarded the right of three States to withhold consent to suit by the Tribes and has also misapplied the law relating to intervention in cases before this Court.

Arizona, California, and Nevada have the right to withhold consent to the intervention sought by the five Tribes. Arizona refused consent, but California and Nevada gave it on the condition, among others, that independent counsel for each intervening Tribe be designated the only counsel for purposes of arguing in court, presenting evidence, questioning witnesses, and entering into stipulations on behalf of the Tribe. The United States' role would be advisory only. However, both the Tribes and the United States rejected such a condition. The result is that no consent has been given, and while the two States would renew such an offer, its rejection precludes any intervention at this time.

Even were consent not required, however, the Tribes would have to meet the general requirements for intervention in a case before this Court. As we have argued previously, Federal Rule 24 is an applicable standard and the Tribes can qualify, if at all, only for permissive intervention. Yet, one requirement for

permissive intervention is that it not cause undue delay or prejudice, a likely result of the very dual representation the Tribes and the United States seek and which our rejected condition sought to prevent. Therefore, the Tribes do not qualify under Rule 24.

In addition to Rule 24, this Court has developed the "compelling interest" test to determine the propriety of intervention in original actions. The Tribes do not meet that test and intervention must also be denied on that ground.

Finally, it should be noted that the arguments of the Tribes in support of their motions to intervene have been considered by this Court in regard to a similar motion by the Navajo Tribe in the original proceedings and rejected.

### B. Applicability of Sovereignty Immunity

As we have argued in previous pleadings in this matter,[7] the States of Arizona, California and Nevada are all immune from suit in federal courts without their consent by any or all of the five Indian Tribes irrespective of whether each Tribe is deemed a citizen of any one state, several states, or no state. The interventions sought by the five Tribes constitute suits against the States, and sovereign immunity is implicated

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[7] *See* Response of the States of Arizona, California, and Nevada and the Other California Defendants to Motion for Leave to Intervene as Indispensable Parties, Filed by the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribes, and the Quechan Tribe of the Fort Yuma Indian Reservation and joined by the National Congress of American Indians as Amicus Curiae, dated January 25, 1978, at pages 4-7; *see also* Response of the States of California and Nevada, the Coachella Valley County Water District, and the Imperial Irrigation District to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene, dated June 1, 1978, at pages 3-6.

notwithstanding the fact that claims of the five Tribes to Colorado River water are already before this Court. Furthermore, 28 U.S.C. 1362 does not abrogate that immunity in a case such as this where the United States is already a party, asserting tribal claims as trustee.

**(1) Interventions Sought Would Constitute Suits Against the Three States**

Whether or not a suit is one against a state is not to be determined by formalities of the law of parties but by the actual effect a judgment in favor of the applicants would have against the state. "(T)he nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex Parte Ayers*, 123 U.S. 443, 490-99; *Ex Parte New York*, 256 U.S. 490, 500; *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 296-98." (*Ford Motor Co. v. Treasury Department*, 323 U.S. 459, 464 (1945).)

The five Tribes seeking to intervene claim additional present perfected rights above those quantified in the 1964 Decree in this matter. In so doing, they seek a judgment that would be contrary to the interests of all three States. There are claims for additional rights to use of water in each State. Any such claims for use of water in Arizona or Nevada would be adverse to the interest *parens patriae* of California since in time of extreme shortage, there would be more high priority claims for water in the other two States, claims that would be given priority irrespective of State lines or the overall apportionment of the Colorado River among the three States. (Decree of the Court, *supra*, Article II(B)(3).) Similarly, those

additional claims for use of water in California or Nevada would be adverse to Arizona and those for use of water in Arizona or California would be adverse to Nevada.

The relief sought by the five Tribes is not merely in the nature of an injunction prospectively directing the Secretary of the Interior to allocate Colorado River water in a different manner than previously decreed by this Court. The real effect of the relief would be to retroactively divest water rights priorities by moving rights in each State down the priority ladder and interposing ahead of them new rights in the other States which would be satisfied first in times of extreme shortage. The essential nature and effect of intervention, therefore, is to seek to take away water rights priorities in which each State has an interest *parens patriae*. By seeking to establish additional claims adverse to each of the three States, the intervention sought by the five Tribes would constitute a suit against the States.[8]

**(2) State Immunity Is Implicated Notwithstanding This Court's Ancillary Jurisdiction to Hear Additional Indian Tribe Water Claims**

The Special Master has held that the States' sovereign immunity is not implicated by the Tribes' motions to intervene because all claims asserted in intervention are ancillary to claims already before this Court, in this case, and as to which the States have no immunity. (Memorandum and Report, pp. 16-24.) We respectfully disagree.

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[8]We note that the Special Master has agreed with this conclusion. *See* Memorandum and Report, footnote 41, page 25.

The Special Master correctly reasons that this Court, in this case, provides the only forum for assertion of claims of the five Tribes to additional Colorado River water rights. However, he then makes an unwarranted jump to the conclusion that the Tribes themselves are entitled to intervene as parties to assert these claims because they must be presented here or not at all. But this overlooks the fact that the United States, as trustee for the Tribes, is already a party and is empowered to fully assert these claims to the same extent as the Tribes themselves. *Heckman v. United States*, 224 U.S. 413- 444-45 (1912). Ancillary jurisdiction applies to claims and provides that all ancillary claims can be heard; it is not concerned *per se* with what parties assert those claims, only that the claims can be presented. See *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922); *Natural Gas Pipeline Co. v. Federal Power Commission*, 128 F.2d 481, 485 (7th Cir. 1942). If the five Tribes were the only parties who could assert these claims, then ancillary jurisdiction might permit their intervention notwithstanding state immunity. In this case, however, the United States not only can assert those same claims as trustee, but is already a party. Therefore, ancillary jurisdiction does not require intervention and does not impact on state immunity.

**(3) State Immunity Is Not Abrogated by 28 U.S.C. 1362 as Applied to This Case**

The Special Master has ruled that even if state immunity is implicated by the attempts to intervene, that immunity, as against Indian tribes, has been abrogated by Congress through 28 U.S.C. 1362. (Memorandum and Report, pp. 25-30.)

Eleventh Amendment immunity may be abrogated by Congress authorizing suit against a state pursuant to the state's surrender of sovereignty in delegating to Congress its constitutional power. However, such authorization must be evidenced by clear Congressional intent. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-56 (1976); *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 282-85 (1973); *Parden v. Terminal Railroad Co.*, 377 U.S. 184, 190-92 (1964). Such is not present as regards 28 U.S.C. 1362 and its application to the present case.

In *Moe v. Confederated Salish and Kootenai Tribes, etc.*, 425 U.S. 463 (1976), this Court decided that section 1362 allowed Indian tribes to sue states in federal courts under certain circumstances without regard to state immunity. That decision did not include a holding as to any conditions precedent to such a suit, but in dictum, the Court stated:

> "Looking to the legislative history of § 1362 for whatever light it may shed on the question, we find an indication of congressional purpose to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." (*Id.* at 472.)

We contend that the failure of the United States to assert the kind of claims made by Indian tribes seeking to sue states is a requirement for suit without consent under section 1362 and that such requirement has not been met in this case.

The Special Master concludes that this is no longer the prevailing interpretation of section 1362. He correctly cites two pre-*Moe* circuit court decisions for the proposition that Congress did intend to authorize suits

by Indian tribes only when the United States had declined to do so. *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F. 2d 1135 (8th Cir. 1974); *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016 (9th Cir. 1973). His ruling, however, ignores this Court's similar language in *Moe* (quoted *supra*), but notes that the Court did not actually make a holding on this point and argues that Congress could not possibly have so intended in view of *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370 (1978) and other cases. However, *Poafpybitty* and its line of cases only say that the United States' *right* to sue does not preclude a tribe's right to sue. They do not address the issue of whether the United States' *exercise of its right* precludes a tribe suing. The Special Master's use of this line of cases is misplaced and his argument as to what this Court meant in *Moe* is wholly unconvincing. The language in *Moe* is totally consitent with the *Dorgan* and *LaFollette* cases and supports our view as to Congressional intent behind section 1362.

The two post-*Moe* district court cases cited by the Special Master are not inconsistent with our view. In *Aguilar v. Kleppe*, 424 F.Supp. 433 (DC, Alaska, 1976), the court does not discuss Congressional intent or conditions precedent to suit under section 1362 and, in any case, rules against individual Indians seeking to sue. In *Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 446 F.Supp. 1339 (EDC, Washington, 1978), the court rules in favor of intervention by tribes but again does not discuss Congressional intent.

In conclusion, we agree with this Court's statement in *Moe* as to Congressional intent. Since any narrowing of state immunity would require clear and contrary

Congressional intent, we are convinced that section 1362 must be held to require failure of the United States to sue as a condition for suit by Indian tribes against the states without consent.

In this present case, that condition is not satisfied. The United States intervened originally as trustee to fully represent the interests of the five Tribes now seeking intervention. The United States did represent the Tribes as to their original claims and continues to do so as to their additional claims. This Court in *Moe* refers to "the kind of claims" that the United States could have brought but did not. There are two *kinds* of claims to additional water rights—boundary land claims and omitted lands claims. The United States has asserted both. While it might be argued that the larger amounts of practicably irrigable acreage asserted by the Tribes themselves represent claims not asserted by the United States, we doubt that section 1362 was intended so broadly. The amount of each claim is really a matter of strategy and tactics by whomever represents the Tribes' interests, and it hardly seems possible that Congress intended to allow a tribe to sue every time such a strategical or tactical difference arose with the United States. The crucial point is that the United States and the five Tribes both assert claims based on the same legal theories, and therefore it cannot be said that the United States has declined to assert tribal claims. Section 1362 does not authorize suits by the five Tribes in the present case.

### C. Federal Rule 24 Requirements

The Supreme Court Rules do not address intervention, but Rule 9 applies to matters of original jurisdiction, such as this lawsuit. Section 2 of Rule 9 provides:

> "The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court."

Rule 24 of the Federal Rules of Civil Procedure concerns intervention and could appropriately be applied to the intervention motions before this Court and the Special Master.

Section (a) of Rule 24 deals with intervention as a matter of right, but one requirement is that the interest in intervention is not adequately represented by an existing party. We are convinced, as is the United States, that the five Indian Tribes seeking to intervene have been adequately represented by an existing party, their trustee, the United States. However, the Special Master concludes that the "Indian claims are not actually represented" by the United States to the extent that the claims made by the Tribes themselves exceed those made by the United States as trustee. (Memorandum and Report, p. 11.) This analysis is faulty. The only legitimate interest of the Indian Tribes is a fair quantification of their reserved water rights in order to serve the "reasonable needs" of their reservations, an interest that the United States effectively asserted in the original proceedings and continues to assert aggressively in the present proceedings. The fact that the Tribes are claiming more than the United States considers "reasonable" does not mean, as the Special Master erroneously assumes, that their interests are not being represented, or that they are not being "adequately represented" as required by Rule 24(a). As noted *supra*, these are strategic

and tactical variances, differences in judgment that certainly do not *per se* give rise to a finding of inadequate representation.

Section (b) of Rule 24 deals with permissive intervention and establishes three requirements, one of which is that intervention not cause undue delay or prejudice to the original parties. Rule 24(b) requires that a Court consider this factor in exercising its discretion. We therefore contend that the Court can only grant permissive intervention if prejudice to the original parties is avoided. In this case, we believe prejudice can be avoided only by placing a condition on intervention that will prevent dual representation for the intervening Tribes. However, the Tribes have refused to accept intervention on such conditions. The State Parties believe that the type of dual representation sought by the five Tribes and the United States and approved by the Special Master is inherently prejudicial to any of the other parties seeking to oppose the additional Indian Tribe claims. What could be more fundamental than the notion that each party has only one voice in a lawsuit? Yet, in this case, the Tribes want their own counsel *and* counsel of the United States, and they want each set of attorneys able to present its own case, independent of the other. To aver that all these attorneys will attempt to cooperate and coordinate is a hollow gesture. There will still be two voices speaking for each Tribe, and each voice will be able to be as independent of the other as it desires. If the United States attorneys and the private attorneys are so sure they can coordinate their efforts, then let them decide which one will be the official voice during litigation and which one the non-participating advisor.

It is erroneous to equate the dual representation sought by the Tribes to the presence in this lawsuit of multiple non-Federal parties, each with separate counsel. There are a number of non-Federal parties, but each is a separate entity with its own interests. The interests of the State of California are not identical with those of the different California water agencies, and the State does not represent these agencies. When the State has acted as spokesman for these agencies (and for the other States), it has done so only at the request of their respective counsel. But its interests have never merged with the interests of the other parties on whose behalf it spoke. By contrast, the United States actually represents each Tribe, and its interests as trustee merge with those of the Tribe. The interests of any one Tribe are identical whether represented by the United States as trustee or by private counsel. Therefore, what the Tribes want is dual representation for the same interests, while all the non-Federal parties have at present is single representation for each of a number of separate entities with different interests.

In conclusion, it is apparent that the five Tribes do not qualify for intervention as a matter of right and cannot qualify for permissive intervention as long as they reject that very condition on such intervention that would prevent undue delay and prejudice, the same condition attached to the consent to be sued given by California and Nevada.

### D. The "Compelling Interest" Test

In addition to Rule 24, this Court has developed its own "compelling interest" test to govern intervention in original actions. In *New Jersey v. New York*, 345 U.S. 369 (1953), the Court denied the City of Phila-

delphia's request to intervene in that interstate water dispute on the ground that its interests were adequately represented by the Commonwealth of Pennsylvania, which had previously intervened. The Court relied on the *parens patriae* principle that a state "must be deemed to represent all its citizens", which it recognized as "necessary recognition of sovereign dignity, as well as a working rule for good judicial administration". (*Id.* at 372-73.) Consequently, it held that "an intervenor whose State is already a party should have the burden of showing some *compelling interest* in his own right, apart from his interest in a class with all other citizens and creatures of the State, which interest is not properly represented by the state." (*Id.* at 373; emphasis added.)

The *parens patriae* rationale is equally applicable to the analogous representation of Indian tribes by the United States, as to which this Court has concluded "there can be no more complete representation." *Heckman v. United States*, 224 U.S. 413, 444-45 (1912). Indeed, the Court has recognized as much in *United States v. Nevada*, 412 U.S. 534 (1973), in which it denied a motion by the United States for leave to file a complaint with the Court against Nevada and California to adjudicate certain water rights, including those it was asserting on behalf of the Paiute Indian Tribe. The Court relegated the United States to the district court, a course of action it found compelling in part because "individual users of water in the Newlands Project, who ordinarily would have no right to intervene in an original action in this Court [citing *New Jersey v. New York*] would have an opportunity to participate in their own behalf if this litigation goes forward in the District Court." (*Id.* at 538.)

Although the Court did not expressly state that the Paiute Indian Tribe would be under a similar disability, such an inference is reasonable, particularly since the Tribe had not sought to intervene.[9] The "compelling interest" test is particularly appropriate in the present action where the sole interests which the United States is asserting are those of the Indian petitioners (Memorandum and Report, p. 10), unlike a state's presumed representation of all its affected water users and other sovereign interests.[10]

The Special Master's reliance on the fact that a number of California water agencies are co-defendants with the State of California and are represented by independent counsel (Memorandum and Report, p. 16) ignores this Court's rejection of that same argument in *New Jersey v. New York, supra* at 374-75:

> "The presence of New York City in this litigation is urged as a reason for permitting Philadelphia to intervene. But the argument misconstrues New York City's position in this case. New York City was not admitted into this litigation as a matter of discretion at her request. She was forcibly joined as a defendant to the original action since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey."

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[9]*See United States v. Alpine Land and Reservoir Company*, 431 F.2d 763 (9th Cir. 1970).

[10]The Special Master's reliance on the fact that Indian tribes apparently have been permitted to intervene in actions of various kinds in the district courts and courts of appeals (Memorandum and Report, p. 15, n. 26) is misplaced. Apart from the fact that none of those interventions were contested, they are irrelevant to the far stricter rule which this Court has fashioned for original actions.

Neither the United States nor the Indian petitioners have demonstrated a compelling interest which would justify independent representation of the Tribes in these proceedings. Indeed, the Special Master's analysis turns solely on the undisputed fact that important interests of the Indian petitioners are involved and on what we have seen, *supra*, to be a faulty analysis which concludes that because Indian claims for additional water for several categories of land are greater than the United States claims for those lands, "the Indian claims are not actually represented" by the United States. (Memorandum and Report, p. 11.)

Although the Special Master asserts that "common sense suggests that those most directly affected by the litigation should be able to assert their own interests" (Memorandum and Report, p. 7), this Court has rejected that rationale in original actions where the states and the United States contend solely in their representative capacities. In *New Jersey v. New York, supra*, it refused to follow the Special Master's rationale and declined to permit Philadelphia to intervene for fear that the Court would "be drawn into an intramural dispute over the distribution of water" within Pennsylvania. Such a Pandora's box could well be opened in these proceedings, since the Special Master properly recognized that "even the interest of the Tribes among themselves are potentially adverse." (Memorandum and Report, p. 9.) *See also Utah v. United States*, 394 U.S. 89 (1969).

## E. Previous Denial of Navajo Tribe Motion to Intervene

In determining that the several Indian Tribes should be permitted to intervene in this action and be represented by their own counsel, the Special Master has overlooked this Court's previous denial of the motion of the Navajo Tribe for leave to intervene in the earlier proceedings.

On September 25, 1961, while the report of Special Master Rifkind was pending before the Court on exceptions, the Navajo Tribe filed a motion for leave to intervene in these proceedings,[11] alleging generally that the Tribe was entitled to intervene because its interests had not been adequately represented by the United States. Arizona[12] and the United States[13] opposed the motion. California[14] and New Mexico[15] did not object, but simply requested an opportunity for a reasonable time to respond to the Navajo petition should the motion be granted.

Arizona pointed out that the Navajos and a number of other tribes (including the Colorado River Indian

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[11]"Motion on Behalf of Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah for Leave to Intervene, Brief in Support Thereof, and Petition of Intervention".

[12]"Brief of Arizona In Opposition to Motion of the Navajo Tribe of Indians for Leave to Intervene", filed October 16, 1961.

[13]"Response of the United States to the Motion on Behalf of the Navajo Tribe of Indians for Leave to Intervene", filed November 6, 1961.

[14]"Response of California Defendants to the Motion for Leave to Intervene, Tendered by the Navajo Indian Tribe, September 26, 1961", filed October 30, 1961.

[15]"Statement of New Mexico Relating to Motion on Behalf of Navajo Tribe of Indians for Leave to Intervene", filed November 1, 1961.

Tribes, currently petitioners in intervention) had previously filed a motion for leave to file a "representation of interest" with Special Master Rifkind in June 1956, which he had denied,[16] and which the Tribes had not pursued further. Arizona contended, *inter alia*, that (1) granting the Navajos intervention would constitute an unconsented-to suit against Arizona in violation of the Eleventh Amendment and (2) the United States had exclusive authority to represent the Tribe.

The United States argued that "it is plain that there is no basis for intervention by the Navajo Tribe either as a matter of right or as a matter of judicial discretion."[17] It argued that it had exclusive authority to represent the Navajos, that the petition was untimely, and that, in any event, the United States' representation had been fully adequate.

The Court denied the Navajo Tribe's motion without comment on November 20, 1961. (368 U.S. 917.) On December 27, 1961, the Navajo Tribe filed a motion for reconsideration,[18] which was also denied without comment on January 8, 1962. (368 U.S. 950.)

Although the Court did not indicate which arguments raised by the United States and Arizona in opposition to the Navajo petition it relied on, the above arguments are as valid today as they were then. If the United

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[16]Transcript of Proceedings before Special Master Simon H. Rifkind, pp. 2638-46, set out as an appendix to California's response, n. 13 *supra*.

[17]U.S. Response, n. 12, *supra*.

[18]"Motions by Navajo Indian Tribe for Reconsideration of Its Motion for Leave to Intervene and for Order to United States to Show Cause Why It Should Not Be Ordered to Account to the Court as to the Adequacy of its Representation of Navajo Interests; Brief in Support of Motions."

States' representation of Indian interests was considered adequate by the Court at a time when the United States was representing a number of important federal interests in addition to the interests of its Indian wards, it is even more so today when the Indian interests are the sole interests being asserted by the United States. (Memorandum and Report, p. 10.)

**CONCLUSION**

The controversy before the Court is an extremely important one—the allocation of a limited water supply. It is no less important to the State Parties than it is to the Indian Tribes. For this reason we have from the start supported initiation of these proceedings to resolve the controversy.[19] But while the State Parties have presented their positions on all aspects of the controversy to the Special Master for his consideration and ultimate ruling by this Court, the United States and the Indian Tribes seek to limit the issues and thereby circumscribe the ability of the State Parties to protect their interests. Thus, with respect to additional water claims for so-called "omitted lands" the United States and the Tribes would ignore the applicable law in bar of such claims. The Special Master supports this strategy by refusing to rule on the objections of the State Parties to hearing such claims and instead has directed trial on such claims. Similarly, on the equally significant claims of the United States and the Tribes to additional water based upon enlarged reservation boundaries, the

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[19]Response of Metropolitan Water District, *et al.*, to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene and Petition of Intervention, dated June 1, 1978, at p. 9; Response of the States of Arizona, California, and Nevada and the other California Defendants to the Motion of the United States for Modification of Decree, dated February 14, 1979, at pp. 4-10.

United States and the Tribes would preclude the State Parties from questioning the correctness of their alleged boundary changes.

We are disappointed by this strategy for we have recognized the importance to everyone of resolving these issues. We are puzzled by the Special Master's whole-hearted adoption of the position of the United States and the Tribes since it is so blatantly unfair to the State Parties. Indeed, while the scarce water supply is extremely important, perhaps even more important is having a trial procedure that comports with judicial traditions of fairness—a procedure which permits both sides to protect their interests. This is not the case where the State Parties must proceed to trial on certain issues that have been tried and are barred from retrial and where other issues, the resolution of which bear directly on the water allocation determinations, will be excluded from the case. We believe that the Special Master is proceeding in a manner that denies fundamental fairness to the State Parties and is not calculated to obtain final resolution which is desired by all the parties.

In addition, the Special Master is permitting double legal representation of the tribal claims to additional water—that of the United States and, independently, that of each of the five Indian Tribes. We believe this ruling is prejudicial to the State Parties and creates an unsound precedent.

For the above reasons we urge this Court to reject the Special Master's Memorandum and Report on Preliminary Issues and direct the Special Master to afford full hearing and determine the reservation boundary issues, to rule on the State Parties' opposition to hear-

ings on additional water claims based on so-called "omitted lands" or, in the alternative, rule itself on this legal issue, and to deny the petitions for intervention of the five Indian Tribes so long as the United States, as a party to these proceedings, advances the Indian reservation water claims.

Respectfully submitted,

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